(2)

No. 00- 929

Supreme Court, U.S.
FILED
FEB 2 2001
CLERK

IN THE

Supreme Court of the United States

TRANSATLANTIC SCHIFFARTSKONTOR GmbH,

Petitioner,

v.

SHANGHAI FOREIGN TRADE CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

ELLIOT SILVERMAN
Counsel of Record
MCDERMOTT, WILL & EMERY
Attorneys for Respondent
50 Rockefeller Plaza
New York, New York 10020
(212) 547-5400

165017

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

16pp

QUESTION PRESENTED

The Foreign Sovereign Immunities Act, in pertinent part, permits courts of the United States to exercise jurisdiction over claims against an instrumentality of a foreign state, if "the action is based upon . . . an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2).

Does this provision permit a United States District Court to exercise jurisdiction over a suit by a German corporation against an instrumentality of the People's Republic of China, where the German plaintiff was suing as the assignee of three default judgments entered by a court in Hong Kong against the Chinese agency; the United States suit sought to convert those Hong Kong judgments into United States judgments; and the Hong Kong judgments had been entered in favor of the bankruptcy trustees of a Hong Kong corporation, based on claims that the Chinese agency had received fraudulent transfers, in China, from that Hong Kong corporation, and had breached a duty to indemnify that Hong Kong corporation for losses it had suffered in Hong Kong?

STATEMENT PURSUANT TO RULE 29.6

Respondent Shanghai Foreign Trade Corporation ("SFTC") has no parent corporations. No publicly held company owns 10% or more of SFTC's stock.

TABLE OF CONTENTS

	Page
Question Presented	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	iv
Statement of the Case	1
A. Nature of the Case	1
B. Statement of Facts	1
C. Proceedings Below	4
Reasons for Denying the Writ	5
I. The Decision Of The Court Of Appeals Involves No Important Question Which Should Be Resolved By This Court	5
II. The Second Circuit's Decision Conflicts With No Other Circuit's Decisions	9
Conclusion	10

TABLE OF CITED AUTHORITIES

Page

Cases:

Byrd v. Corporacion Forestal y Industrial, 182 F.3d 380 (5th Cir. 1999) 9

Davis v. Monroe County Board of Education, 526 U.S. 629 (1999) 1

Holly Farms Corp. v. NLRB, 517 U.S. 392 (1996) 5

Matsushita Electric Industrial Co. v. Epstein, 516 U.S. 367 (1996) 5, 6

Republic of Argentina v. Weltover, 504 U.S. 607 (1992) 6

Santos v. Compagnie Air France, 934 F.2d 890 (7th Cir. 1991) 6

Saudi Arabia v. Nelson, 507 U.S. 349 (1993) 6, 7

Southway v. Central Bank of Nigeria, 198 F.3d 1210 (10th Cir. 1999) 10

Statutes:

28 U.S.C. § 1604 ..... 1, 6

28 U.S.C. § 1605(a)(2) ..... i, 6

Cited Authorities

Page

Rule:

United States Supreme Court Rule 10(c) 5

STATEMENT OF THE CASE

A. Nature of the Case

Petitioner Transatlantic Schiffartskontar GmbH ("TASK") brought this case to convert three Hong Kong judgments into United States judgments.

TASK, a German corporation, sued as the assignee of the bankruptcy liquidators of a Hong Kong corporation known as Vincor Shipping Co., Ltd. ("VSL"). The liquidators had assigned to TASK three judgments which VSL's bankruptcy estate had obtained, on default, in the Supreme Court of Hong Kong against respondent Shanghai Foreign Trade corporation ("SFTC"), a corporation owned by the government of the People's Republic of China.

The United States Court of Appeals for the Second Circuit held that SFTC was immune from the jurisdiction of the United States Courts under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1604 (reproduced at A54). (References preceded by "A" are to the Appendix to the Petition for Certiorari; references preceded by "CAJA" are to the Joint Appendix filed in the Court of Appeals.)

B. Statement of Facts

Introduction. SFTC's motion to dismiss was based solely on the face of TASK's Amended Complaint. (*See* A2). Accordingly, for purposes of this Brief, SFTC will assume the truth of the allegations made in that complaint. *See, e.g., Davis v. Monroe County Board of Education,* 526 U.S. 629, 633 (1999).

Vincor Shipping Co., Ltd. Vincor Shipping Co., Ltd. ("VSL") was a Hong Kong corporation, formed under the Companies Ordinance Act of Hong Kong. (A72). TASK alleges that VSL was a joint venture among several public and private entities in China and Hong Kong, including the predecessor to SFTC. (A67, 72).

The Shipping Contracts. VSL's business included chartering vessels and engaging in maritime transport. (A68). Beginning in 1984, VSL entered into certain charter parties and contracts of affreightment with TASK, a German shipping company, regarding shipments of cargo from Europe to China. (A68).

SFTC was not a party to, or a signatory of, any of these shipping contracts (CAJA 54-75), but TASK's Complaint alleges that VSL was the "agent" of SFTC and that SFTC had a duty to indemnify VSL for any losses VSL incurred under these contracts. (A69). The Complaint alleges, inconsistently, that this duty to indemnify was "implied by law" under the joint venture agreement (A69) and that there was "an internal agreement" between SFTC and VSL providing for indemnification (A71; *see* A3).

The shipping contracts between VSL and TASK were governed by Hong Kong law and provided that any disputes were subject to arbitration in Hong Kong. (A70). They also provided that freight charges were to be paid by VSL to Transatlantic in U.S. dollars, and that payment was to be made to Transatlantic's bank account in Hamburg, Germany via wire transfer through a correspondent bank in New York. (A70, CAJA 81-90).

TASK's Arbitration Against VSL. In 1984 and 1985, the port of Shanghai, China was congested, resulting in delays in unloading ships chartered by VSL from TASK. As a result, TASK claimed demurrage fees from VSL, which VSL did not pay. (A71). ("Demurrage" refers to the fee payble to the owner of a chartered vessel if the vessel is not unloaded and returned within the time specified in the charter party.) (A3 n.2).

TASK brought arbitration claims against VSL in Hong Kong under the shipping contracts. SFTC was not named as a party to any of these arbitrations, and did not appear in any of them. (A71, CAJA 144-199). In December of 1987, an award was entered in favor of TASK with respect to some of those contracts; a judgment entered on that award was satisfied. (A72). In June of 1989, another arbitral award was entered in favor of TASK with respect to some, but not all, of the remaining contracts. (A73). Both awards were rendered solely against VSL; neither mentioned SFTC. (CAJA 144-199).

VSL's Bankruptcy. While these arbitrations were pending, VSL allegedly made three transfers of capital to SFTC, between October of 1986 and November of 1988. (A73). In December of 1988, VSL, after changing its name to "Harlifax Ltd.," declared voluntary liquidation in Hong Kong. (A72).

TASK, as a credit of VSL, applied to the Supreme Court of Hong Kong to appoint bankruptcy liquidators for VSL. TASK made claims against VSL's bankruptcy estate with respect to certain of the shipping contracts which had not been the subject of arbitral awards. The liquidators allowed those claims in part. (A74, CAJA 200-201).

The Hong Kong Judgments. Those bankruptcy liquidators later brought three lawsuits in the courts of Hong Kong against SFTC, on behalf of VSL. (A74). SFTC did not appear in those actions, and default judgments were entered. (A75).

Three default judgments were entered, all in the name of VSL. (A99-108). One judgment was to recover the monies which VSL had transferred to SFTC before its bankruptcy. The other two judgments were based on SFTC's breaches of its alleged obligation to indemnify VSL — one with respect to the arbitral award against VSL in favor of TASK, and the other with respect to TASK's claims under the contracts which had not resulted in arbitral awards. (A75-76).

The liquidators of VSL subsequently assigned these judgments to TASK, in satisfaction of TASK's claims again VSL's bankruptcy estate. (A78).

C. Proceedings Below

TASK filed suit against SFTC in the United States District Court for the Southern District of New York. That court initially dismissed the case, finding that SFTC had immunity from suit under the FSIA. (A18-36). The district court later granted a motion for reconsideration, and denied SFTC's motion to dismiss. (A37-45).

On interlocutory appeal, the Court of Appeals for the Second Circuit reversed, and ordered the complaint dismissed. (A1-15). That court later denied TASK's petition for rehearing. (A16-17). TASK then filed its Petition for Certiorari.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS INVOLVES NO IMPORTANT QUESTION WHICH SHOULD BE RESOLVED BY THIS COURT

The Court of Appeals resolved this case on extremely narrow grounds, limited to the unusual facts of this case. Accordingly, this case involves no important question of federal law which should be settled by this Court. *See* Supreme Court Rule 10(c).

Although TASK's Petition refers to various important issues under the FSIA which were raised below, the Second Circuit declined to decide any of those issues, finding that, under the unique facts of this case, SFTC would not be subject to jurisdiction in the United States regardless of how those issues were resolved.

Thus, for example, although one of the alternative arguments SFTC raised in the Court of Appeals was that no suit to enforce a foreign judgment could be brought under section 1605 of the FSIA (*see* A7-8 & n.3), the Court of Appeals decided the case without reaching that issue (A8-9). Similarly, the Court of Appeals did not reach the issue of whether the assignee of a foreign judgment could invoke the jurisdiction of the federal courts under the FSIA. (A11).

It is well-settled that this Court will "generally . . . not address arguments which were not the basis for the decision below." *E.g.*, *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 300 n.7 (1996); *Matsushita Electric Industrial Co. v. Epstein*,

516 U.S. 367, 379 n.5 (1996). Because none of the issues raised in the Petition was actually the basis for the decision of the Court of Appeals, the Petition should be denied.

TASK invoked the district court's jurisdiction under 28 U.S.C. § 1605(a)(2). (*See* A5; the statute is reproduced at A55). Under that statute, foreign states and their instrumentalities — which are normally immune from the jurisdiction of state and federal courts, 28 U.S.C. § 1604 (A54) — may be sued in the United States if the suit is "based upon . . . an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."

Thus, to support jurisdiction in this case, TASK was required to allege facts sufficient to show that "this lawsuit is (1) based upon an act outside the territory of the United States; (2) that was taken in connection with a commercial activity of [SFTC] outside this country; and (3) that caused a direct effect in the United States." *Republic of Argentina v. Weltover*, 504 U.S. 607, 611 (1992). The Court of Appeals found, correctly, that TASK's allegations failed to satisfy the "based upon" requirement, and it therefore did not need to reach any of the other elements. (A7-11).

As this Court has previously held, a suit is "based upon" only "those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Saudi Arabia v. Nelson*, 507 U.S. 349, 357 (1993). In other words, an "action is based upon the elements that prove the claim, no more and no less." *Id.* (*quoting Santos v. Compagnie Air France*, 934 F.2d 890, 893 (7th Cir. 1991)). It is not sufficient under the FSIA that a case have "a mere connection with, or

relation to, commercial activity," *Nelson*, 507 U.S. at 358, unless that commercial activity is an element of the claim sued upon.

TASK argued below, and argues in this Court, that its shipping contracts with VSL caused a direct effect in the United States, because VSL's payments to TASK were to be forwarded through a correspondent bank in New York. That may or may not be true, but is quite beside the point. TASK did not sue in this case to recover damages for VSL's breach of its contracts with TASK, nor did it sue to enforce the arbitration awards it obtained against VSL. It sued SFTC, to enforce judgments rendered in favor of VSL against SFTC, which judgments were later assigned to TASK. Those judgments awarded damages to VSL on account of SFTC's receipt of fraudulent conveyances from VSL — an act which took place in China — and on account of SFTC's failure to indemnify VSL — an omission which took place in China and Hong Kong. Those judgments were thus based upon no act which caused any effect, much less a direct one, in the United States.

Moreover, as the Second Circuit held, the fact that the liquidators of VSL assigned those judgments to TASK, rather than some other assets of VSL, was wholly fortuitous, a fact which further erodes any connection between TASK's claim and any act of VSL which caused any effect in the United States. The Second Circuit explained its holding as follows:

> The legal proceedings against SFTC that resulted in the three default judgments that TASK now seeks to enforce were brought by VSL's Hong Kong liquidators against SFTC on behalf of VSL. TASK now has a claim against SFTC only because

> the VSL liquidators chose to assign to TASK these judgments rather than one other assets that would have satisfied TASK's claims in the amount of HK$12,512,940.36 against VSL. But how VSL's liquidators chose to pay TASK was not in any way dependent on the New York contract or on any acts in breach of that contract that had a direct effect in New York. And TASK was, presumably, indifferent to show this payment was to be accomplished.
>
> Thus, VSL's obligations to TASK might have been satisfied with cash, with a pot of gold, or with HK$12,512,940.36 worth of bananas. Similarly, VSL might have assigned to TASK foreign court judgments that VSL obtained against SFTC for SFTC's breach of a contract whose entire locus and place of performance had nothing to do with the United States or with TASK. Had VSL done this, it clearly could not be argued that these judgments were "based upon" acts having a direct effect in the United States. For even assuming that foreign judgments, or the assignment of them, can ever satisfy the "based upon" requirement, if the acts upon which the assigned judgments are themselves grounded do not meet the "based upon" requirement of § 1605(a)(2) of the FSIA — i.e., where they are not acts taken in connection with a commercial activity that caused a direct effect in the United States — an action to enforce the foreign judgments in U.S. Courts must fail for lack of subject matter jurisdiction.

(A 10-11) (footnotes omitted).

In short, the decision of the Second Circuit was clearly correct under the prior decisions of this Court and is, in any event, an extremely narrow holding based on the unusual facts of this particular case. There is thus no basis for granting a writ of certiorari.

II. THE SECOND CIRCUIT'S DECISION CONFLICTS WITH NO OTHER CIRCUIT'S DECISIONS

TASK claims that the decision below conflicts with decisions of the Fifth and Tenth Circuits, because the Second Circuit supposedly held that assignees have no right to sue under the FSIA. The Second Circuit, however, held no such thing. Indeed, it expressly declined to decide whether or not suits on assigned or purchased judgments could satisfy the FSIA. (A11). Instead, as noted above, the Second Circuit recognized that TASK was suing as the assignee of VSL's bankruptcy liquidators, and therefore held that it could not rely on its *own* contractual dealings with VSL as a basis for asserting jurisdiction over SFTC. (A10-11).

The cases cited by TASK (Petition at 24-26) are not to the contrary. In *Byrd v. Corporacion Forestal y Industrial*, 182 F.3d 380, 391 (5th Cir. 1999), the court held that assignees of a lease could sue under the FSIA if their assignor could have sued under that statute, because they acquired the rights of their assignor. In this case, in contrast, TASK's assignors (the bankruptcy liquidators of VSL) could not have sued under the FSIA, because their claim was based solely on acts and omissions which took place in China and Hong Kong, not on any acts which caused any direct effect in the United States. Indeed, this was the explicit basis of the Second Circuit's decision. (A10-11)

The other case relied upon by TASK, *Southway v. Central Bank of Nigeria*, 198 F.3d 1210, 1218 (10th Cir. 1999), merely held that privity of contract between the plaintiff and the foreign sovereign is not necessary under the FSIA, so long as the foreign sovereign injured the plaintiff through commercial activity having a direct effect in the United States. Here, TASK's suit was dismissed not for lack of privity of contract, but simply because the only rights it could assert — those of its assignors — did not arise out of any act which caused any direct effect in the United States. (A11).

* * *

In short, the Second Circuit's decision was entirely consistent with this Court's prior decisions under the FSIA, and with the decisions of other circuits. This case, moreover, involves no important issues of federal law which should be decided by this Court, bur rather represents nothing more than an application of well-settled rules to a unique and uncommon factual situation.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ELLIOT SILVERMAN
Counsel of Record
MCDERMOTT, WILL & EMERY
Attorneys for Respondent
50 Rockefeller Plaza
New York, New York 10020
(212) 547-5400